EXECUTIVE SUMMARY

**Client Problem:** The Islamic State of Iraq and the Levant (“ISIL”) is a growing international terror threat. It has seized territory, and it challenges the fragile governments of Iraq and Syria. It threatens US core values and global interests.

**Policy Question:** How should the United States Government (“USG”) prosecute the ISIL leader, Abu Bakr al-Baghdadi (“ABAB”), if it captures him?

**Overall Recommendations:**

1) **The USG should consider the empirically proven benefits of capturing terrorist leaders rather killing them.** Both the scholarship discussed in Part III and the independent statistical analysis discussed in Appendix A shows the empiricism behind the benefits. The empirical evidence suggests decapitation hastens the demise of terror groups, but that “capture” decapitation strategies do so more than “kill” strategies. The intuitive rationale is that capture yields intelligence from interrogation and prosecution renders a strategic communications impact of the rule of law.

2) **The USG should only opt for a capture / prosecute strategy once it has sufficient admissible evidence to secure a conviction.** This calculation must be made for whichever court policymakers intend to try him. Different courts have different rules of evidence and pose different practical and procedural hurdles to bringing evidence before a judge and jury. If the USG can link ABAB to ISIL’s crimes only through classified documents and source-protected witnesses, then prosecutors may not have sufficient evidence to convict without that information. This dilemma is more problematic the more “international” the prosecution becomes. US prosecution confronts its own evidentiary problems, such as the rule against hearsay.

3) **The USG should attempt to capture as many ISIL members in the top echelon as possible.** Beyond the obvious value of dealing more damage to ISIL, capturing a larger group of ISIL leaders than just ABAB serves two purposes. First, prosecuting a leader of a criminal organization is uniquely difficult. Prosecutors must link the actions of the leader to the crimes of the organization; testimony to that linkage becomes critical. While accomplices have loyalty to a leader, they still reveal information under interrogation and are often willing to testify to save themselves from a harsher sentence. Having witnesses with first-hand knowledge of ABAB’s directives is particularly important for US prosecution, because the rule against hearsay bars second-hand testimony. Second, more detainees increases the achievability of the non-US prosecution options. Creating an international tribunal or hybrid court, or investing in an International Criminal Court inquiry, is more feasible if prosecutors will have a docket replete with defendants, rather than a sole offender.
**Possible Courses of Action:**

**COA #1 - Prosecution by an International Tribunal.** The USG would transfer ABAB to an international authority, either the International Criminal Court, or a separate tribunal created by the UN Security Council. International law prosecutors then try him for crimes against humanity, genocide, and war crimes.

**COA #2 - Prosecution by a United States Attorney.** The USG transports ABAB to the United States for trial in federal court on charges of material support to terrorism under Title 18, United States Code § 2339B, and other applicable federal charges, including a federal statute criminalizing genocide, 18 USC § 1091.

**COA #3 - Prosecution by an allied Arab Government.** The USG would transfer ABAB to an allied Arab government for crimes against their citizens, crimes of terror, and for international crimes. This COA includes consideration of a “hybrid court,” an internationally supported institution that bolsters a national court’s criminal court system to prosecute offenders of international crimes.

**COA Recommendation:**

**COA #3: Prosecution by an allied Arab Government**

The USG should submit Abu Bakr al-Baghdadi (“ABAB”), the leader of ISIL, to an allied Arab government for prosecution. The best candidate is Jordan, and the optimal method of Jordanian prosecution of ABAB is through an internationally supported “hybrid court” structure similar to the globally-backed tribunals built atop the national legal systems of Bosnia, Sierra Leone, Iraq, East Timor and Cambodia.

**COA #3 and the Criteria:** COA #3 achieves, or partially achieves, all the criteria.

1. **Achievability:** COA #3 is feasible, as it rests either entirely or largely on the existing structure of the Jordanian State Security Court (“SSC”). It also offers finality to victims and policymakers alike. The SSC court proceeds quickly (in marked contrast to international tribunals), and offers capital punishment upon conviction.

2. **Conviction:** COA #3 offers a relatively high probability of a criminal conviction based on the cultural and geographic proximity to victims and witnesses, the lack of defendant-friendly procedural and evidentiary rules of COA #2, more flexibility than COA #1 to filtering foreign intelligence for evidence, and a strong track record of efficiency of the SSC against terror suspects. (This last point is not a euphemism that the SSC is illegitimate, as the recent Abu Qatada acquittal by the SSC highlights.)
3. **Control & Intelligence:** COA #3 partially offers the USG overall control and the USG an opportunity to extract significant intelligence. The USG can perform a military intelligence interrogation prior to a handover, and will maintain control of ABAB until the transfer. After the transfer, the USG will lose control but may retain significant influence.

4. **Security:** COA #3 avoids security concerns with an ABAB detention. Under this COA, the USG would never bring ABAB to the United States.

5. **Impact on ISIL:** COA #3 will negatively influence ISIL’s popular and political support more so than the other COAs. The trial would be fully in Arabic. The strategic communications impact of this “local” prosecution compares favorably to prosecution by “the West,” either by the USG or by international jurists in The Hague. This COA offers a trial in a Muslim and Arab court close to ISIL’s primary propaganda target audience.

6. **Diplomatic Impact:** COA #3 will positively influence the USG’s relationships with foreign governments and populations, though the impact will likely be more positive with Arab nations than with European allies. The former may welcome a USG initiative to have a Muslim and Arab lead in prosecuting the leader of the “Islamic State.” Conversely, European allies would likely voice valid concerns about Jordan’s human rights record towards defendants. They may argue that an international tribunal—specifically the International Criminal Court—is a superior option to safeguard ABAB’s rights. Their opposition will be more fervent if a sentence of capital punishment is possible.

**Analysis Matrix:**

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